SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statutes

IN THE

Supreme Court of the United States

October Term, 1969
No. 788

WINTON M. BLOUNT, Postmaster General of the United States, and EVERETT T. CARPENTER, Postmaster of the City of Los Angeles, State of California,

Appellants,

vs.

TONY RIZZI, dba The Mail Box,

Appellee.

On Appeal From the United States District Court for the Central District of California.

MOTION TO AFFIRM.

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellee moves that the judgment of the district court be affirmed.

Statement.

This is a direct appeal from a judgment of a three-judge district court, entered on August 1, 1969, restraining the appellants from enforcing the provisions of 39 U.S.C. 4006 against appellee and directing the appellants to vacate an order of the judicial officer of the Post Office Department, executed on or about December 31, 1968, instructing the Postmaster of the

City of North Hollywood, State of California, to return to the sender all mail addressed to appelleee (with minor exceptions) with the word "Unlawful" stamped upon the outside of such mail. Pursuant to 28 U.S.C 2201-2202 and 2282-2284, appellee sought a judgment declaring 39 U.S.C. 4006 unconstitutional on its face and as construed and applied, upon the grounds that the statute violated rights guaranteed to appellee under the free speech and press, due process, equal protection, and jury trial provisions of the First, Fifth, Sixth and Seventh Amendments to the United States Constitution. Appellee also prayed for injunctive relief against enforcement of the said statute upon similar grounds. A three-judge court was convened. The court held that the statute was unconstitutional on its face (See Jurisdictional Statement, Appendix A, pp. 15-17); made findings of fact and conclusions of law (Ibid. pp. 17-21); and entered judgment as aforestated (Ibid. pp. 21-22).

ARGUMENT.

The district court correctly concluded that 39 U.S.C. 4006 is unconstitutional on its face because it fails to meet and conflicts with the standards and criteria enunciated by the Court in *Freedman v. Maryland*, 380 U.S. 51, and *Lamont v. Postmaster General*, 381 U.S. 301. The points raised by appellants are not sufficiently substantial to warrant plenary consideration by this Court. Accordingly, it is submitted, it would be appropriate for the Court to affirm the judgment below summarily.

1. 39 U.S.C. 4006 provides that upon evidence "satisfactory to the Postmaster General" that a person is obtaining remittances for allegedly obscene matter through the mail, the Postmaster General is authorized to direct Postmasters at the office at which letters or mail arrive to such person to return the letters or mail to the sender marked "Unlawful"; to forbid the payment by a Postmaster to such person of any money order or postal note; and to provide for the return to the remitter the sums named in the money orders or postal notes.

The initial decision with respect to the alleged obscenity under the statute is made without any judicial participation. The administrative regulations call for the filing of the complaint and notice of hearing, which shall not exceed 15 days from the service of the complaint. "Whenever practicable", the hearing date shall be within 30 days of the date of the notice. 952.7 (Jurisdictional Statement, Appendix C, p. 60). When the Judicial Officer presides at the hearing, he shall issue a final or a tentative decision. No time limit is in-

dicated. 952.24(b) (Ibid. p. 71). The Judicial Officer is authorized to refer the record in any proceeding to the Postmaster General or the Deputy Postmaster General for final Departmental decision. 952.26(e) (Ibid. p. 73). It is plain that no effective time limit is imposed for completion of action by the Postmaster General.

The statute places no burden upon the Postmaster General to promptly initiate judicial proceedings and makes no provision for a prompt, final, judicial decision. The statute therefore authorizes a prior restraint without any safeguards for the exercise of freedoms of speech and press guaranteed by the First Amendment.

2. In light of the foregoing, the statute plainly contravenes the rulings of this Court in *Freedman v. Maryland,* 380 U.S. 51, and *Teitel Film Corp. v. Cusack,* 390 U.S. 139. See also, *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 175, 181-182. In *Freedman,* this Court made plain that "any system of prior restraints of expression" comes to the court bearing a heavy presumption against its constitutional validity. Due process requires initially that the burden of proving that material is unprotected expression must rest upon the agency which seeks to forbid the expression. Moreover, the State must give assurance that the suppressing agency will, "within a specified brief period", go to court to obtain a judicial determination. The statute must also "assure a prompt final judicial decision" to minimize the deterrent effect of an interim and possibly erroneous suppression of constitutionally protected material. A statute which fails to provide such adequate safeguards against undue inhibition of

protected expression runs afoul of the guarantees of the First and Fifth Amendments. As this Court stated in *Interstate Circuit, Inc. v. City of Dallas,* 390 U.S. 676, 682, "There has been no retreat in this area from rigorous insistence upon procedural safeguards and judicial superintendence of the censor's action".[1]

3. As the district court below correctly observed: "The burden of seeking judicial review of the Postmaster General's decision is placed on the person against whom the mail block has been imposed." (Jurisdictional Statement, Appendix A, p. 16). The statute also limits the unfettered exercise of the right of persons to willingly receive publications. Therefore, 39 U.S.C. 4006 undermines the "fundamental right" to receive publications and unconstitutionally imposes obligations to obtain the material which the First Amendment was intended to prevent. The deterrent effect upon senders and receivers creates inhibitions on the dissemination of ideas, forbidden by the guarantees of the First Amendment. *Lamont v. Postmaster General,* 381 U.S. 301.[2]

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[1]A recent decision by a three-judge court in the United States District Court for the Central District of California (Barnes, Circuit Judge, and Curtis and Ferguson, District Judges) held that 19 U.S.C. 1305 is unconstitutional in violation of the free speech and press and due process provisions of the First and Fifth Amendments, reliance being placed upon the decisions of this Court in *Freedman v. Maryland, Lamont v. Postmaster General,* and *Stanley v. Georgia,* 394 U.S. 557. *United States v. Thirty-Seven (37) Photographs,* Civil No. 69-2242-F. A copy of the opinion of the district court is attached hereto as Appendix A.

[2]There were other contentions raised by appellee which the district court did not reach (Jurisdictional Statement, Appendix A, p.16). These included the unconstitutional invalidity of the statute because (1) the statute authorizes an administrative agency to suppress material without a judicial proceeding; (2) to suppress without the protections of a jury trial; (3) to sup-

(This footnote is continued on the next page)

4. Appellants' arguments are devoid of merit. It is urged that the statute is constitutional because unlike *Freedman*, the Post Office "was not created for the business of censorship" (Jurisdictional Statement, p. 7); that "subsequent" judicial review proceedings, while limited to the administrative record, would still permit the reviewing court to review the materials in question and determine whether they could support the administrative determination. It is argued that "this may suffice to demonstrate the constitutionality of the statute" (Jurisdictional Statement, p. 7). The argument is plainly untenable. The question is not whether an agency was created for the "purpose of censorship"; the real issue is whether "any system of prior restraints of expression" can be imposed by a statute without the safeguards demanded by the requirements of the First Amendment. The concededly limited "subsequent judicial review" which the appellee must seek is not enough to satisfy the constitutional requirements. *Freedman v. Maryland*; *Lamont v. Postmaster General*; *Hannegan v. Esquire*, 327 U.S. 146.

The appellants suggest that "if serious question remains", regarding the fact and timing of judicial supervision, "a limited construction" is available to meet "those doubts" (Judicial Statement p. 7). It is suggested that "it would be appropriate to treat any appeal of a Section 4006 order as automatically staying its effect, where a Section 4007 judicial order for temporary

press without the safeguards of proof of *scienter* and the essential elements of obscenity; (4) the statute is vague, ambiguous and overbroad; (5) the statute authorizes the Post Office to engage in invidious discrimination between constitutionally protected material and comparable material which the agency, for subjective reasons, deems obscene; and (6) the publications were not obscene and were entitled to constitutional protection.

detention of mail was not then in effect". It is conceded that even such a construction would require the mailer to take the initiative of filing an appeal, but it is contended that this burden only "slightly taints the statutory scheme" (Jurisdictional Statement p. 8). This call for judicial construction is fruitless. In the first place, it is an inappropriate request for judicial legislation. "Neither we nor the Commissioner may rewrite the statute simply because we may feel that the scheme it creates could be improved upon." *United States v. Calamaro,* 354 U.S. 351, 357. In the second place, the statute as rewritten would plainly be contrary to Congressional purpose. In the third place, if the mail is to flow until a judicial determination is made (Jurisdictional Statement p. 9), prior administrative proceedings and decisions are unnecessary. Finally, the "chilling effect" of the administrative proceedings and determinations would remain. *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58; *Freedman v. Maryland; Lamont v. Postmaster General.*

Conclusion.

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

STANLEY FLEISHMAN,
Attorney for Appellee.

APPENDIX A.

Memorandum Opinion.

United States of America, Plaintiff, v. Thirty-Seven (37) Photographs, Defendants, Milton Luros, Claimant. Civil No. 69-2242-F.

Before: Barnes, Circuit Judge, and Curtis and Ferguson, District Judges.

Ferguson, District Judge:

This is an action before a three-judge district court, convened pursuant to 28 U.S.C. §§ 2282 and 2284, to determine whether the government should be enjoined from enforcing 19 U.S.C. § 1305. That statute prohibits all persons from importing into the United States any obscene picture or book. It provides that when such an item appears at a customs office it shall be seized and held to await the judgment of a district court.

On October 24, 1969, Milton Luros returned to Los Angeles from a visit to Europe, arriving by plane. In his personal luggage he carried 37 photographs. In the course of an inspection, customs agents acting under authority of § 1305 seized the photographs as obscene. The agents referred the seizure to the United States Attorney, and on November 6, 1969, the government filed its complaint seeking judicial authority to enforce the forfeiture of the photographs.

On November 14, 1969, the claimant filed an answer contending the photographs were not obscene. His counterclaim contends that § 1305 violates the First and Fifth Amendments, and seeks an injunction to restrain the government from enforcing the statute in relation to the 37 photographs.

The case presents a five-fold constitutional attack on § 1305, claiming that:

(1) It excludes from the United States photographs imported for use by adults in the privacy of their home.

(2) It excludes photographs which are to be distributed to adults only and in a manner which will not invade the sensitivities or privacy of anyone.

(3) It permits customs agents to seize and hold pictures without a time restraint.

(4) It permits a seizure prior to an adversary hearing.

(5) It is unconstitutionally vague.

The cornerstone of the attack, of course, is *Stanley v. Georgia,* 394 U.S. 557 (1969). There the Supreme Court minimally held that the First Amendment prohibits the making of mere private possession of obscene material a crime. The lower courts now are faced with whether *Stanley* means more than that. See *Karalexis v. Byrne,* Civil No. 69-665-J (D. Mass., Nov. 28, 1969); *Stein v. Batchelor,* 300 F. Supp. 602 (N.D. Texas 1969).

The claimant requests this court to hold that *Stanley* means that the First Amendment forbids any restraint of obscenity unless (1) it falls in the hands of children, or (2) it intrudes upon the sensitivities or privacy of the general public. Without rejecting this argument, we decide the case based upon the narrowest construction of *Stanley.*

19 U.S.C. § 1305 reaches all obscene works. It prohibits an adult from importing an obscene book or picture for private reading or viewing, an activity which

is constitutionally protected. As stated in *Stanley,* the right to read necessarily protects the right to receive. The claimant does not contend, however, that he was merely going to bring the pictures into his own home. He admits that it is his intention to incorporate the pictures in a book for distribution.

The admission of claimant, that is, to distribute and not to view privately, does not prohibit his attack on invalidity of the statute. *Freedman v. Maryland,* 380 U.S. 51 (1965), grants the claimant standing for it holds that in determining the validity of a statute in relation to the First Amendment, a court must determine what the statute can do. If the statute can violate the freedom of speech and press, then it is invalid. This it clearly does. It prohibits a person who may constitutionally view pictures of the right to receive them. To quote from Justice Brennan's concurring opinion in *Lamont v. Postmaster General,* 381 U.S. 301, 308 (1965), "[T]he right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."

The First Amendment cannot be construed to permit those who have funds for foreign travel to bring back constitutionally protected literature while prohibiting its access by the less affluent.

A second attack on the statute further involves *Freedman v. Maryland, supra.* Any system of censorship must contain, at the minimum, the following procedural safeguards if it is not to contravene the first and Fifth Amendments, (1) any restraint prior to judicial determination can be imposed only briefly, and (2)

the censor in a specified brief period will go to court. The safeguards must be contained in the statute or by judicial rule. Section 1305 is a system of censorship by customs agents and is barren of safeguards.

In the context of this case, the claimant concedes that the government has moved rapidly for a judicial determination of the forfeiture. Yet from the date of the seizure to January 9, 1970, the date of the court hearing, 76 days had passed. All concede that under present statutory procedures it could not have been accomplished any sooner. Section 1305 does not prohibit customs agents from long delaying judicial determination. The First Amendment does not permit such discretion.

We are aware of *United States v. One Carton Positive Motion Picture Film*, 367 F.2d 889, 899 (2d Cir. 1966), which stated, "[S]pecific time limitations on administrative action are unnecessary and would serve only to inject inflexibility into the regulatory scheme. . . ." That may or may not be true. We only note that such is contrary to the explicit holding in *Freedman, supra* at 58-59, "[T]he exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period . . . go to court. . . ." We must follow *Freedman*.

We decline to consider as unnecessary the remaining attacks on the constitutionality of § 1305, *i.e.*, (1) vagueness and (2) the law set forth in *Marcus v. Search Warrant*, 367 U.S. 717 (1961), and *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964).

Pursuant to the provisions of Rule 52 of the Federal Rules of Civil Procedure, this memorandum opin-

ion shall constitute the court's findings of fact and conclusions of law.

In accordance with the provisions of Rule 58, a judgment shall be separately prepared and entered as follows:

"1. Pursuant to 28 U.S.C. § 1253, this is an order in a civil action heard and determined by a district court of three judges granting a permanent injunction after notice and hearing.

"2. The United States and its agents are restrained and enjoined from enforcing the provisions of 19 U.S.C. § 1305 against the claimant Milton Luros, in relation to the 37 photographs seized by customs agents in Los Angeles, California, on October 24, 1969.

"3. The United States shall deliver said photographs to the claimant.

"4. 19 U.S.C. § 1305, on its face and as construed and applied, violates the rights guaranteed to the claimant under the free speech and press and due process provisions of the First and Fifth Amendments to the United States Constitution.

"5. The enforcement of this judgment shall be stayed for a period of 30 days, in order to preserve to the government its right of appeal."

Dated this 27th day of January, 1970.

/s/ WARREN J. FERGUSON
Warren J. Ferguson
United States District Judge

We Concur: /s/ STANLEY N. BARNES, Stanley N. Barnes, United States Circuit Judge. /s/ JESSE W. CURTIS, Jesse W. Curtis, United States District Judge.